IRVING J. THORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

PETITIONER'S REPLY BRIEF

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

JACOB RASSNICK
Attorney for Petitioner
15 Park Row
New York, New York
212-BA 7-2618

FAMILEY SERVICE, INC.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-979

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REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent chooses to ignore the question presented and bases its opposition on the glib comment that "The cases relied upon by petitioner are not to the contrary."

This passes the burden to this Honorable Court to consider the holdings in the cases questioned by respondent.

In the case of *Versaci v. United States*, 403 F.2d 246 (Ct. Cl.), the Court reversed the decisions of the Correction Board and the Secretary of the Army on the ground that they were incorrect and against the weight of evidence respecting the extent of his disability relative to his retirement disability allowance.

In the case of *Merson v. United States*, 173 Ct. Cl. 92, 401 F. 2d 184, the United States Court of Claims found judgment for claimant on the ground that he was physically unfit for service when he retired from the service mistakenly as physically fit.

In the case of *Beckham v. United States*, 392 F. 2d 619 (Ct. Cl.), the United States Court of Claims found judgment for plaintiff where an ulcerated duodenum was considered so disabling as to entitle the claimant to disability retirement from the time of his expiration from active duty. The Court further held at page 619:

> "....where there is showing that Board, acting for Secretary, acted arbitrarily, capriciously, without support of substantial evidence and contrary to applicable statutes and regulations, Court has obligation to entertain claim for disability retirement pay. 10 U.S.C.A. § 1201."

As to the cases cited by respondent on page 3 of its brief, when petitioner mentioned these authorities in his petition, he did not do it for the purpose of showing that he had been denied an appearance before the Retirement Board, but to show that petitioner was predicating his claim on disabilities which were ignored or overlooked by the Board, which made an erroneous finding that petitioner's physical condition was not disabling to a pensionable degree and that it is within the province of this Honorable Court to consider whether the Court below committed error in refusing to consider newly discovered evidence always held adequate by other Courts as a basis for reopening a claim.

As to the cases of *Friedman v. United States*, 159 Ct. Cl. 1, 310 F. 2d 381, cert. denied sub nom; *Lipp v. United States*, 373

U.S. 932 and *O'Callahan v. United States*, 196 Ct. Cl. 556, 451 F. 2d 1390, it seems sufficient to call the Court's attention to the following statement on page 396 (c) in the Friedman case, supra:

> "A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality."

The petitioner was misled from the very start, as the record clearly shows, which invited and necessitated reopening of prior tentative and erroneous determinations time and time again to clarify, first, the existence of service connected disability and, thereafter, the nature and extent thereof relative to his disability retirement compensation.

Due to his materially worsening and failing health, never considered, anticipated, or allowed for by the Government relative to petitioner's disability retirement, the Government cannot now be heard to say and must be estopped from asserting that time-bar is a defense; particularly, insofar as the misleading and tentative nature of all the prior decisions herein is plainly delineated in the record.

CONCLUSION

The Court below was in error in relying on respondent's version of the *Friedman* case, supra, which was apparently based on excerpts from the headnotes taken out of context and not representative of but inconsistent with the opinion itself.

The writ sought by petitioner should be granted in the interests of justice, under the circumstances herein.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner